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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1139

THEODORE GLADDEN,

Petitioner

v.

P. HENDERSON & CO.

v.

LAVINO SHIPPING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Theodore Gladden, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on November 2, 1967.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (App. A, *infra*, pp. 13-21) is reported at ——F. 2d ——. The opinion of the Trial Court (App. B, *infra*, pp. 23-26) is reported at 39 F. R. D. 303 (E. D. 1966).

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 2, 1967 (App. A, *infra*, p. 22). By order dated January 31, 1968, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including Wednesday, February 21, 1968. The jurisdiction of this Court is invoked under U. S. C. A. 1254 (1).

QUESTION PRESENTED.

Where the petitioner longshoreman was paid $70 a week under the Longshoremen and Harbor Workers Compensation Act, which is a fraction of his regular income, and he testifies that he stopped seeing his physician and went back to work after seven weeks, notwithstanding he still had pain, because he was behind in bills, was it not prejudicial for the Court to permit questions relating to the receipt of these benefits?

STATEMENT OF THE CASE.

This was a civil action commenced by Theodore Gladden as petitioner-plaintiff, arising out of an injury suffered by him while working as a longshoreman aboard the S/S Katha on August 31, 1961. All page references are to the Appendix filed in the Court below.

Theodore Gladden had been a longshoreman since the age of sixteen. At the time of the accident, he was twenty-six years of age (254a, 253a). He had not finished high school. Apart from four years in the Navy, he had spent his entire working career on the waterfront as a longshoreman (254a). He was married. Prior to the accident he was making well over $6000 per year.

On the day of the accident, the petitioner was hired as a winch operator for a 7:00 p.m. start aboard the S/S Katha. The first thing that petitioner did upon boarding the vessel was to check the rigging at the No. 2 hatch, which the gang of which he was a member had been assigned. Petitioner was operating the inshore winch in which the lines were rigged from the vessel to a block on the pier. This type of rigging places a greater strain on the lines and the blocks utilized. There was a bucket-type seat for the winch operator to sit in while he operated the winch (267a).

The seats being made of metal, the plaintiff, who was a heavy man, put some mats on the seat to lend it some degree of softness (267a). He sat on the rear part of the seat so as to have leg room (267a). The heel block for the inshore fall was fastened by a rope to the padeye on the mast house to prevent athwartship movement of the block. In addition, the block itself was raised in a vertical plane and wrapped around the heel of the boom by a wire that had been doubled with two half-hitches then moused with four

pieces of rope (78a). Mousing means that the open ends of the half-hitch are tied in an attempt to prevent them from parting. This arrangement had been rigged by the crew (79a). During the discharging operations that evening, the wire holding the block to the boom came loose, the wire having cut through the mousing (80a). The sudden force caused the rope holding the block to the mast house to break and the block swung in the direction of the plaintiff, striking him in the back (81a). Plaintiff found himself on his hands and knees on the deck (272a). Plaintiff, after a brief rest, was walked off the vessel and driven to the front of the pier by a supervisor (273a, 274a).

The only factual testimony contrary to the petitioner's version of the accident, supported by fellow longshoremen, was the testimony of two supervisors for the respondent stevedore, Lavino Shipping Company. These two witnesses —Doyle (401a) and Donnelly (509a)—were permitted to testify, over objection, that it was physically impossible for the block upon the breaking of the rope to strike the plaintiff sitting in the seat provided. This position or contention was never stated in respondent Lavino's pretrial memorandum, though local rules require defendant or third-party defendant to indicate the areas of agreement or disagreement with the facts stated in the plaintiff's pretrial memorandum and to set forth their contentions in opposition, if any.

Plaintiff was first treated at Albert Einstein Medical Center, Southern Division, in the Accident Ward (275a). Shortly thereafter, he came under the care of Dr. Jacob Krause, a certified orthopedic surgeon, who found first an acute lumbo-sacral sprain and thereafter a chronic lumbo-sacral sprain (171a, 193a). Inasmuch as the plaintiff was a very large man with a certain degree of obesity, the excess weight imposed additional physical stress on an injured musculo ligamentus structure (195a).

During the course of the trial, petitioner's counsel had elicited from petitioner that he had not seen his physician after seven weeks because his bills had gotten behind and he was returning to work to try to catch up with the bills and support his family (277a). On cross-examination counsel for the respondent, P. Henderson & Co., was permitted over objection to elicit from the petitioner that he had been paid $70.00 a week by the respondent stevedore, Lavino Shipping Company, during the period of time that he was out of work (316a-319a).

The trial of the cause which began before the Honorable Ralph C. Body on May 10, 1965, resulted in a verdict for the defendant. During the argument prior to the submission of the case to the jury, counsel for the respondent shipowner, P. Henderson & Co., in the light of racial cleavage in which the petitioner and his witnesses were Negro and the witnesses for the respondents and the jury were white, argued that in order for Mr. Gladden to exercise his "rights" in Court, he must also observe his "responsibilities" (816a, 817a). Objection was made to this line of argument and exception granted (817a).

Post-trial motions were timely filed and denied and an opinion filed on February 21, 1966 by the Trial Court. Appeal was then timely taken by the petitioner to the United States Court of Appeals, Third Circuit. On November 2, 1967, the Court of Appeals affirmed the judgment of the court below. The opinion of that Court found that the testimony of the petitioner that he prematurely returned to work and did not visit his physician again because he had fallen behind in the payment of his bills gave license to the defendant to inquire as to benefits received by him under the Longshoremen and Harbor Workers Compensation Act.

REASONS FOR GRANTING THE WRIT.

The Opinion of the Court Below Has Vitiated the Protective Scope of Eichel v. New York Central Railroad Company, 375 U. S. 253, 11 L. Ed. 2d 307 (1963) and Permits the Prejudicial Receipt of Evidence of Collateral Benefits.

Eichel v. New York Central Railroad Company, 375 U. S. 253, 11 L. Ed. 2d 307 (1963) was a landmark case inasmuch as it recognized the prejudicial impact of collateral benefits under pension and compensation statutes. This Court in a Per Curiam opinion reversed the Court of Appeals for the Second Circuit which had admitted evidence of disability pension payments under the Railroad Retirement Act for the purpose of impeaching the testimony of the plaintiff as to his motive for not returning to work and as to the permanency of his injuries. The Court of Appeals had found that the prejudicial effect of receiving such testimony was outweighed by the substantial probative value of such evidence.

The Court of Appeals for the Second Circuit in *Eichel* had recognized that it would be error to permit such testimony to be utilized in mitigation of damages. The Court of Appeals, however, had permitted the testimony on the basis that it was permissible for impeaching the credibility of the plaintiff.

However, in reversing the Court of Appeals in the *Eichel* case, this Court said:

> "In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than

the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 USC § 228b (a)4, were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act." (footnotes omitted)

In the instant case, the circumstances are almost identical. The distinguishing feature of the circumstances of the instant case is that the plaintiff in testifying on direct examination testified that he did not see a physician after six weeks because he had bills to pay and returned to work. It is this single factor that forms the basis of the opinion of the Court below as removing the petitioner from the protective mantle of *Eichel.*

The Court in its opinion ignores the fact that the $70.00 paid per week under the Longshoremen and Harbor Workers Act is but a fraction of what petitioner customarily received during his employment. It ignores the fact that the average working man does not have a cushion of savings to fall back on and fractional income, while better than nothing, does not necessarily obviate economic duress.

Thus, an injured claimant must forego a frank statement of his economic position and the effect upon his motivation as to medical treatment and returning to work lest it permit the defendant to utilize the avowed prejudicial effect of collateral benefits. The paucity of the $70.00 benefit in alleviating financial distress when a longshoreman is out injured has long been recognized.[1]

The Court below, as an afterthought in further justification of permitting the receipt of collateral benefits, points to the fact that Workmen's Compensation as such

1. There is now pending before Congress a bill to increase the maximum benefits paid under the Longshoremen and Harbor Workers Act to $105.00 per week; S. 2485, 90th Cong. 1st Sess. § 3(a).

was never mentioned. If anything, this is more prejudicial to the petitioner. In this light, there could be an implication that a beneficent employer without legal cause contributed to the petitioner's support. Coupling this with the fact that executives of the employer were the only fact witnesses contrary to the position taken by the petitioner, this lent an unfair gloss to their testimony. The Court below also seeks absolution from the *Eichel* doctrine by the fact that in self-defense, counsel for the petitioner argued that any monies received from the employer would have to be paid back. Apart from the fact that this was never so charged by the Trial Court, this argument is much like attempting to stem a breach in the dikes by one's fingers; it is woefully inadequate.

The Court of Appeals for the Third Circuit in the instant case seeks to create escape hatches from the ineluctable language of *Eichel* that upon closer examination proves to be mirages. If this be permitted, almost anything that the plaintiff says can be utilized to vitiate the rule in *Eichel.*

The petitioner had been examined by a physician of the Respondent Henderson's choosing. There was available medical testimony to present, to dispute the contentions of the petitioner as to his physicial disability. There was no need to introduce the benefits paid under the Longshoremen and Harbor Workers Act [2] in any guise. The intention was clearly to exploit its prejudicial effect. In the instant case, the issue of damages was not reached because of a verdict for the defendant on the liability issue.

A defendant's verdict does not make the receipt of the evidence of collateral benefits harmless, as was recognized in *Tipton v. Socony Mobil Oil Company,* 375 U. S. 34, 11 L. Ed. 2d 4, rehearing den. 375 U. S. 936, 11 L. Ed. 2d 268, see also: *Caughman v. Washington Terminal Co.,* 345 F. 2d

2: Longshoremen and Harbor Workers' Compensation Act, March 4, 1927, c. 509 § 1, 44 Stat. 1424; 33 U. S. C. A. 901, et seq.

434, 435. The prejudicial effect of the receipt of this type of testimony pervades all the issues of the case. This is especially so when the jury in the Eastern District of Pennsylvania is chosen from a wide swath of communities, including rural counties where the collateral benefits would seem unusually lucrative. A jury such as this might not be capable of seeing this amount in the proper perspective to the petitioner's prior scale of living.

In *Page v. St. Louis Southwestern Ry. Co.*, 349 F. 2d 820, 822 (C. A. 5, 1965), the Court of Appeals for the Fifth Circuit found that there were no escape hatches or exceptions to the broad scope of *Eichel:*

> "Both *Tipton* and *Eichel* reflect a strong policy against the use of such collateral source evidence in FELA and analogous Jones Act-maritime law seamen's cases. With the whole result in our case being the enigma wrapped in the mystery of a general verdict concealing forevermore the use or uses to which the jury might have put this evidence, we cannot say that the error, preserved by emphatic and timely objection, was harmless." (Page 822)

In *Mangan v. Broderick and Bascom Rope Co.*, 351 F. 2d 24, 27-30 (C. A. 7, 1965), reh. den., a spectrum of rationale was utilized by ingenious counsel to implant the prejudicial effect of receipt of compensation benefits into a trial. In rebuffing these attempts, the Court of Appeals for the Seventh Circuit there said:

> "Any slight value which such evidence might have in discrediting a witness is far outweighed by the likelihood that such evidence will be misused by a jury. *Tipton v. Socony Mobile Oil Co.*, 375 U. S. 34, 84 S. Ct. 1, 11 L. Ed. 2d 4; *Eichel v. New York C. R. Co.* 375 U. S. 253, 84 S. Ct. 316; *Burnett v. Hernandez,* 9 Cir., 263 F. 2d 212. Indeed, we can conceive of few instances in

> which the value of such evidence would merit the effort of its producement if the evidence did not at the same time advise the jury that the plaintiff had already collected some money for his injury. As one court pointed out the "smell" of insurance or workmen's compensation must be presumed to affect a jury adversely to a plaintiff's cause. *Burnett v. Hernandez,* 9 Cir., 263 F. 2d 212, 214." (Page 30)

It must be remembered in this case that there was an attempt by counsel for the respondents to sow in the courtroom the seeds of racial ferment at a time when persons of questionable motives were equating responsibilities with civil rights. Analogous language was used by counsel for the respondent Henderson as to the petitioner herein (816a, 817a). In this climate, the receipt of the evidence as to compensation benefits was doubly provocative and prejudicial.

In *Thompson v. Kawasaki Kisen, K. K.,* 348 F. 2d 879 (C. A. 1, 1965), the receipt of testimony similar to the instant case was permitted. With dubious reasoning, the Court decided that *Eichel* was applicable only as to cases under the Federal Employers' Liability Act and that under Rule 43(a) of the Federal Rules of Civil Procedure, the more liberal rule as to the receipt of evidence would apply as to the Federal and state courts. The Court found that in Massachusetts the receipt of such testimony is admissible and on that basis, the judgment of the Court below was affirmed. Even if this dubious reasoning be accepted, it could not be applied to the instant case. The Supreme Court of Pennsylvania in *Boudwin v. Yellow Cab Co.,* 410 Pa. 31, 188 A. 2d 259 (1963); *Lobalzo v. Varoli,* 409 Pa. 15, 20-21, 185 A. 2d 557 (1962) has echoed the principles set forth in *Eichel v. New York Central Railroad Co., supra.* Thus, even under the doubtful reasoning of *Thompson v.*

Kawasaki Kisen, K. K., 348 F. 2d 879 (C. A. 1, 1965) respondent Henderson should not have been permitted to elicit from the petitioner evidence as to his receipt of benefits under the Longshoremen and Harbor Workers Act.

CONCLUSION.

This Court has always stood as a bastion against the emasculation and erosion of the substantial legal principles that it promulgates to correct inequities and secure justice. The salutary principles established in *Tipton v. Socony Mobil Oil Company*, 375 U. S. 34, 11 L. Ed. 2d 4, rehearing den. 375 U. S. 936, 11 L. Ed. 2d 268, and *Eichel v. New York Central Railroad Company*, 375 U. S. 253, 11 L. Ed. 2d 307 (1963), are in danger of being riddled with meaningless exceptions. The decision of the instant case in the Court below, if not reversed, will be seized upon as a signpost for evasion of the salutary principles set forth in *Eichel*. A claimant would be forced to suppress the reasons he returned to work lest he be said to open the door to the introduction of highly prejudicial testimony as to the receipt of benefits under the Workmen's Compensation Act.

Respectfully submitted,

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